Nos. 24-1021, 24-1113

IN THE
Supreme Court of the United States

CEDRIC GALETTE, *Petitioner,*
v.
NEW JERSEY TRANSIT CORPORATION, *Respondent.*

NEW JERSEY TRANSIT CORPORATION, ET AL.,
Petitioners,
v.
JEFFREY COLT, ET AL. *Respondents.*

On Writs of Certiorari to the Supreme Court of Pennsylvania and Court of Appeals of New York

BRIEF OF NATIONAL GOVERNORS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF NEW JERSEY TRANSIT PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1908, the National Governors Association (NGA) is the collective voice and membership organization representing the governors of the nation's 55 states, territories, and commonwealths. NGA is bipartisan, with its Chair alternating between Republicans and Democrats. Further, the Chair and Vice Chair always represent different parties, and the party of the governor holding the Chair has a minority of positions on the bipartisan Executive Committee. This ensures that NGA's actions obtain bipartisan support.

Our nation's governors are dedicated to leading their states and territories to find solutions that improve lives and protect the health, safety, and welfare of their citizens. Through NGA, governors identify priority issues and deal with matters of public policy and governance at the state, national and global levels.

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[1] No counsel for any party has authored this brief in whole or in part, and no entity or person other than *amicus curiae* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

When they joined the Union, states retained their inherent immunity from suits in other states' courts. *See* Part I, *infra*. Whether an entity is an arm of a state for purposes of that immunity is "a question of federal law," albeit one that turns heavily on "the provisions of state law that define the agency's character." *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 430 n.5 (1997). The inquiry is not a "formalistic question" of counting factors, *id.* at 431, but rather must proceed "practically," *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994), based on "the relationship between the State and its creation," *Regents*, 519 U.S. at 431.

States utilize a variety of entities and structures to carry out a wide range of vital functions, and their varied structures should not undermine their recognition as arms of the state. Depriving such entities of sovereign status would cause serious disruption to federalism, which protects state prerogatives and policies. *See* Part II, *infra*.

Accordingly, out-of-state courts should defer to how the entity is treated by its home state. In particular, courts should strongly weigh the state executive branch's control over the entity in question. Governors often have significant powers over membership, resource allocation, and policy determinations by entities like NJ Transit, an arrangement that makes little sense if those entities are not arms of the state. Being so broadly subject to a governor's authority also clearly differentiates such

entities from non-arms of the state like counties and municipalities.

This Court has long recognized that executive control is highly relevant to whether an entity is an arm of a sovereign. *See* Part III, *infra*. Plaintiffs in the cases now before this Court tellingly attempt to minimize that consideration, but their arguments only confirm the sovereign nature of NJ Transit. As explained below, the Governor of New Jersey exercises significant power over NJ Transit, which is entirely consistent with it being an arm of the state. *See* Part IV, *infra*.

This sort of arrangement is not unique to New Jersey and its Governor. Other governors have similar authority over entities that the lower courts have routinely deemed to be arms of the state, in large part *because of* the state executives' power over those entities. *See* Part V, *infra*.

ARGUMENT

I. States Possess Inherent Sovereign Immunity From Suits in Other States' Courts.

When "the States entered the federal system," they did so "with their sovereignty intact." *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 789 (1991). The Federalist No. 81 assured states that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." The Federalist No. 81 (A. Hamilton).

John Marshall similarly explained during the constitutional debates: "'With respect to disputes

between a state and the citizens of another state, … I hope no gentleman will think that a state will be called at the bar of the federal court.'" *Franchise Tax Board of California v. Hyatt*, 587 U.S. 230, 242 (2019) (quoting 3 *Debates in the Several State Conventions on Adoption of the Federal Constitution* 555 (Jonathan Elliot ed. 1876)).

As this Court has explained, "[t]he generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity," and the state ratifying conventions "made clear" that they "understood the Constitution as drafted to preserve the States' immunity from private suits." *Alden v. Maine*, 527 U.S. 706, 715, 718 (1999). The Eleventh Amendment "acted … to restore" this "original" understanding of the "constitutional design" post-*Chisholm*. *Id.* at 722; *see also id.* at 724 ("The … natural inference is that the Constitution was understood … to preserve the States' traditional immunity from private suits.").

Accordingly, states retain broad immunity from suit in other states' courts. Sometimes, however, there is a question about whether a particular entity qualifies as "the state." As explained next, in making that determination, courts should defer to federalism principles and also strongly weigh the state executive branch's control over the entity.

II. Federalism Protects States' Ability to Utilize a Variety of Organizational Structures Without Forgoing Sovereign Immunity.

In many cases, it is clear the defendant is a state and thus entitled to immunity. But sometimes the matter requires further inquiry because states organize themselves in a variety of ways, often assigning similar functions to very different types of entities. Because each state allocates authority differently, however, out-of-state courts risk misunderstanding or mischaracterizing how another state's entities function and are supervised. States are uniquely positioned to understand the public purposes, governance structures, and accountability mechanisms of their own instrumentalities.

For example, when a state clearly identifies an entity as an instrumentality of the state, that designation should be respected by other states' courts. And, as explained below, courts should also heavily weigh the state executive branch's control over an entity when determining whether it qualifies as an "arm of the state" entitled to sovereign immunity.

Denying immunity to such entities would risk serious interference with state prerogatives. These entities serve as essential extensions of modern governance, often performing vital functions that are inextricably linked to the state's identity and constitutional responsibilities.

Beyond transportation entities like NJ Transit, other at-risk state entities include universities and

other education entities[2]; hospitals and museums[3]; development agencies[4]; railway, port and highway authorities[5]; and student-loan providers.[6]

Unless barred by immunity, private lawsuits may cause these entities to change their priorities and services away from what is in the best policy interests of the state and towards whatever minimizes litigation risk, especially given how expensive litigation has become even when the plaintiffs cannot ultimately prevail. Further, allowing such lawsuits encourages forum shopping, exposing states to unpredictable litigation and costs. Sovereign immunity provides an immediate and relatively low-cost way for such entities to end litigation and thereby preserve their focus and resources on carrying out state programs and policies. But that is all for naught

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[2] *E.g.*, *U.S. ex rel. Oberg v. Pennsylvania Higher Educ. Assistance Agency*, 745 F.3d 131, 144 (4th Cir. 2014); *United Carolina Bank v. Bd. of Regents of Stephen F. Austin State Univ.*, 665 F.2d 553, 557 (5th Cir. 1982).

[3] *E.g.*, *Hennessey v. Univ. of Kansas Hosp. Auth.*, 53 F.4th 516, 537 (10th Cir. 2022); *Montano v. Frezza*, 393 P.3d 700, 702–03 (N.M. 2017); *Ex parte Space Race, LLC*, 357 So.3d 1, 2 (Ala. 2021).

[4] *E.g.*, *United States ex rel. Fields v. Bi-State Dev. Agency of Missouri-Illinois Metro. Dist.*, 872 F.3d 872, 880 (8th Cir. 2017).

[5] *E.g.*, *Alaska Cargo Transport, Inc. v. Alaska Railroad*, 5 F.3d 378, 381–82 (9th Cir. 1993); *P.R. Ports Auth. v. Fed. Maritime Comm'n*, 531 F.3d 868, 870 (D.C. Cir. 2008); *Mancuso v. N.Y. State Thruway Auth.*, 86 F.3d 289, 292 (2d Cir. 1996).

[6] *E.g.*, *Good v. Dep't of Educ.*, 121 F.4th 772, 792–94 (10th Cir. 2024), *cert. petition docketed*, No. 24-992

if they are denied sovereign immunity or have to fight years to get courts to recognize that immunity.

Further, flexibility in governance structures is an essential aspect of federalism. Denying immunity "would interfere significantly with a State's ability to structure relations" and "also threaten the future fashioning of effective and creative programs for solving local problems." *Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980). "A healthy regard for federalism and good government renders us reluctant to risk these results." *Id.* States should not be subject to disfavored treatment simply because they utilize and control entities that do not precisely match some cookie-cutter version of what a state agency should look like.

That is why this Court has held the inquiry must proceed "practically," *Hess*, 513 U.S. at 44, based on "the relationship between the State and its creation," *Regents*, 519 U.S. at 431. As explained next, the relationship between the governor and the entity at issue is of particular significance in the immunity analysis.

III. Arm-of-State Status Turns Heavily on Gubernatorial Authority.

This Court has already recognized that the executive's power over an entity is an important factor in determining whether that entity is an arm of the state.

In *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995), for example, the Court reasoned that the President's ability to appoint 75% of Amtrak's directors was a factor weighing in favor of finding that

Amtrak had government-actor status for First Amendment purposes, *id.* at 397–98. To be sure, *Lebron* involved a federal entity, but the case was still about whether a government-created entity should be treated *as* the government itself.

Further, nobody appears to have disputed that the California Franchise Tax Board was an arm of the state in *Hyatt*. The Governor appoints one of the three members of the Board, which is considered part of California's executive branch, operating under the California Government Operations Agency. The Board's operations are also funded through the state budget, which is proposed by the Governor.

More recently, this Court held that an entity was "subject to the State's supervision and control" primarily because "[i]ts board consists of two state officials and five members appointed by the Governor and approved by the Senate," and the "Governor can remove any board member for cause." *Biden v. Nebraska*, 600 U.S. 477, 490 (2023).

To be sure, a governor's appointment power may not be sufficient on its own to declare the entity to be an arm of the state, but it is a significant factor that often becomes dispositive when combined with "any other" evidence of state control. *Auer v. Robbins*, 519 U.S. 452, 456 n.1 (1997) (governor appointed 80% of the board, but it "is not subject to the State's direction or control in any other respect" and "is therefore not an 'arm of the State'").

Plaintiffs point to *Seila Law* and contend that a chief executive's power to appoint officials is not relevant unless the chief executive has unfettered

power to remove those officials, too. BIO18, No. 24-1113. But that misses the point. In *Seila Law*, the question was whether the removal protections were consistent with Article II, not whether removal protections somehow precluded the CFPB from being an arm of the federal government. Indeed, if the CFPB were not an arm of the federal government, then the President's Article II executive and take-care powers would presumably not apply at all, and thus the removal protections could not have violated Article II.

Plaintiffs also argue that a governor's veto power over an entity's actions means little where he "lacks the authority to compel the board members to take any particular action." BIO17, No. 24-1113. Again, this is too fine-grained. The governor may not exercise truly unfettered power over an entity, but almost no chief executive—state or federal—has such power. Consider so-called independent federal agencies, where the President of the United States has significant ability to influence action by appointing members aligned with his interests and threatening to find "cause" to terminate those who refuse to comply. As above, one may contend that Article II dictates that the President has even broader powers over such entities, but, either way, nobody disputes that such agencies are arms of the federal government, regardless of whether the President can directly dictate the agencies' actions in every instance.

IV. Gubernatorial Authority Over NJ Transit.

Turning to the specific entity in this case: the New Jersey legislature established NJ Transit "in the Executive Branch of the State Government" and

"allocated [it] within the Department of Transportation." N.J. Stat. Ann. § 27:25-4(a). It would be odd to conclude that an entity within the state executive branch is somehow *not* an arm of the state, especially when New Jersey has statutorily declared that NJ Transit is "an instrumentality of the State." *Id.*

If there were any doubt, NJ Transit's sovereign status is confirmed by the Governor's power over its board and actions. He appoints all thirteen members of NJ Transit's board. *Id.* § 27:25-4(b). No board action can take "force or effect" unless the Governor either affirmatively approves the action or lets ten days pass without vetoing it. *Id.* § 27:25-4(f).

The board can neither exist as a functional entity nor take any effective actions without the Governor's blessing. No wonder the Third Circuit concluded NJ Transit is an arm of New Jersey, with the court pointing to the Governor's "responsib[ility] for appointing the entire NJ Transit governing board" and his power to "veto any action taken by NJ Transit's governing board." *Karns v. Shanahan*, 879 F.3d 504, 518 (3d Cir. 2018).

The New York Court of Appeals put weight on the fact that NJ Transit is "independent of any supervision or control by" the New Jersey Department of Transportation, Pet.App.16a in No. 24-1113, but this overlooks that the New Jersey Constitution caps the number of principal departments at twenty, *see* N.J. Const. art. V, § 4, ¶ 1, which often prompts the Legislature to insulate instrumentalities from control

by the department in which they are housed, while retaining extensive gubernatorial control.

By contrast, when it comes to counties and municipalities (i.e., the prototypical governmental entities that are *not* arms of the state), the Governor does not appoint their leaders nor wield a veto over their actions. *See* N.J. Const. Art. V, § 4; *Fraternal Ord. of Police, Newark Lodge No. 12 v. City of Newark*, 236 A.3d 965, 975 (2020) ("[T]he principle of home rule is legislatively stitched into the fabric of New Jersey government.") (citing statutory authorities).

V. Gubernatorial Authority Over Similar Entities Across the Country.

Governors across the country exercise similar powers over similar entities, and the circuit courts have consistently pointed to those powers as significant when finding such entities to be sovereign arms of a state.

A. Appointment Powers.

"The fact that all of an entity's decisionmakers are appointed by the Governor, we have recognized, is a key indicator of state control." *Oberg*, 745 F.3d at 144 (Fourth Circuit); *see Stephen F. Austin*, 665 F.2d at 557 (Fifth Circuit). This aspect demonstrates that the entity is "controlled by the will of the governor," even when the state itself is not on the hook for damages incurred by that entity. *Alaska Railroad*, 5 F.3d at 381–82 (Ninth Circuit).

This factor remains just as strong even where the governor does not appoint *every* member of the entity's board. Appointing even a majority of members is a

"legislative design most courts routinely view as evidence of an entity's lack of independence from State control." *Univ. of Rhode Island v. A.W. Chesterton Co.*, 2 F.3d 1200, 1207 (1st Cir. 1993) (governor appoints 10 of 13 members); *see Singleton v. Md. Tech & Dev. Corp.*, 103 F.4th 1042, 1046, 1052 (4th Cir. 2024) (appoints 14 of 19 directors); *Kashani v. Purdue Univ.*, 813 F.2d 843, 847 (7th Cir. 1987) (selects 7 of 10 members).

And—contrary to Plaintiffs' view—this factor remains highly relevant even when the governor cannot directly remove those members but instead can do so only "for cause," or even requires cause *and* "the approval of a majority of the senate." *Bowers v. NCAA*, 475 F.3d 524, 548–49 (3d Cir. 2007); *see Colby v. Herrick*, 849 F.3d 1273, 1277 (10th Cir. 2017) ("for cause" removal power still pointed in favor of arm-of-state status).

B. Veto Powers.

A "governor's power to block or veto action taken by the board of the entity" likewise strongly points towards arm-of-the-state status. *Hennessey*, 53 F.4th at 537 (Tenth Circuit); *see Fields*, 872 F.3d at 880 (Eighth Circuit).

Accordingly, "veto power over the decisions of the Board [is] a key element of control." *Fresenius Med. Care Cardiovascular Res., Inc. v. Puerto Rico & Caribbean Cardiovascular Ctr. Corp.*, 322 F.3d 56, 72 (1st Cir. 2003).

Contrary to Plaintiffs' view, the relevance of this consideration does not turn on whether the Governor

can affirmatively direct the entity to take action. As with the federal executive, it is far more common for state executives to exercise a negative veto power—and that has repeatedly been counted as among the most important elements of state control in this context. *See* also Part III, *supra*.

* * *

Deeming NJ Transit an arm of the state is straightforward, given the extensive caselaw finding arm-of-the-state status for entities subject to far less executive control than NJ Transit is. A holding to the contrary "would interfere significantly with a State's ability to structure relations," at the cost of "federalism and good government." *Reeves*, 447 U.S. at 441. The Court should be especially "reluctant to risk these results." *Id.*

Accordingly, the Court should find that NJ Transit—like any state entity subject to extensive gubernatorial control—is an arm of the state for immunity purposes.

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to reverse the judgment of the New York Court of Appeals and affirm the judgment of the Pennsylvania Supreme Court.

Respectfully submitted,

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